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HAROLD B. WILL

IN THE

Supreme Court of the United States

October Term, 1955

No. 524

MAY TERRY, *Petitioner*

v.

KEITH L. SEEGMILLER, *Respondent*

Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Petitioner, May Terry, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered on September 30, 1955.

OPINIONS BELOW

The District Court rendered no opinion in this cause. Judgment of Dismissal (App. 2a) was entered on March 17, 1955. The United States Court of Appeals for the District of Columbia Circuit rendered no opinion.

JURISDICTION

Order of the United States Court of Appeals for the District of Columbia Circuit dismissing the appeal (App. 2a) was entered on July 15, 1955. Petition for Reconsideration of Order, entered July 21, 1955 (R. 46) was denied by *Per Curiam* Order, entered September 30, 1955 (App. 3a). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

REASONS FOR GRANTING THE WRIT

This cause was tried on the merits without jury. No opinion was rendered. The purported "Findings of Fact" and "Conclusions of Law" fail to meet statutory requirements. The appellate court sanctioned this procedure by the trial court. The appellate court relied on recommendation of an *amicus curiae,* and dismissed the appeal without statement of reason therefor. The judgment is in conflict with decisions of this court and of other courts of appeal; it is in conflict with their own decisions. Petitioner respectfully submits that this departure from the accepted and usual course of judicial proceedings constitutes such grave injustice as to call for this Court's power of supervision.

QUESTIONS PRESENTED

1. Did the court below sanction departure from the accepted and usual judicial proceedings by the trial court is not requiring that Findings of Fact be made in accordance with Federal Rules of Civil Procedure, Rule 52 (a)?

2. In dismissing the cause herein, without adequate Findings of Fact, was the action of the court below in conflict with decisions of this Court and with decisions of other courts of appeal?

3. Did the court below depart from the accepted and usual course of judicial proceedings in rendering judgment in conflict with its own decisions in other cases on

the same matters, and in substituting the recommendations of an *amicus curiae* for findings of fact by the trial court?

STATUTES AND RULES INVOLVED

The statute and Federal Rules of Civil Procedure involved in this case are set out in appendix hereto.

STATEMENT OF THE CASE

1. Jurisdiction of the Trial Court

Jurisdiction of the United States Court for the District of Columbia over this cause is conferred by Title 28, U.S.C., Section 1331.

2. Proceedings in the Courts Below

On October 19, 1953 petitioner filed in the United States District Court for the District of Columbia "Complaint for Damages Sustained by Reason of Improper Handling of Lawsuit and for Failure to File Appeal within Statute of Limitations". (R. 23-26) Respondent herein was defendant in that suit. The complaint was filed in *persona propria* because petitioner was unable to secure counsel in an action against a member of the District of Columbia Bar Association. Trial by jury was waived, and the case was tried on the merits on March 14-15, 1955. On March 17th petitioner received from respondent an unsigned copy of "Findings of Fact and Conclusions of Law" (App. 1a) and a copy of "Judgment of Dismissal (App. 2a), both of which were entered on March 17th.

On March 22nd petitioner filed motion for new trial. Opposition to this motion was filed on March 25th. Petitioner's motion for new trial was denied on March 25th.

Petitioner filed Notice of Appeal on March 30, 1955, followed by Designation of the Record and Points Relied upon by Appellant, and, on May 16, 1955, filed Brief for Appellant and Appendix (R. 1-36). No brief was filed by

respondent. Instead, on May 20th he filed motion to affirm and dismiss (R. 37). Opposition to this motion was filed on May 23rd (R. 38). These motions were argued before the appellate court on June 2nd, at which time petitioner cited authorities in support of her contentions that the facts had not been found by the trial court, *Southwestern Bell Telephone Co.* v. *City of San Antonio,* 75 F. 2d 880, 881; that, due to her lack of knowledge of law or court procedures and her inability to secure counsel, the trial court's time was consumed in hearing irrelevant evidence, *Oates* v. *United States,* C.C.A. W. Va. 1916, 233 F. 201; that at the opening of the trial she was placed immediately on the witness stand, without either side having stated the case, and was subjected to direct examination by defense counsel; that she was not permitted to qualify or explain her answers (exception taken from the witness stand), and that she was denied the right to complete cross-examination of defendant, *Alford* v. *United States,* 282 U.S. 687, 692, 51 S. Ct. 218, 219, 75 L. Ed. 624.

On June 23rd the Court appointed Edmund D. Campbell, Esquire, as *amicus curiae.* His report (R. 40-43) was entered on July 7, 1955. *Per Curiam* Order dismissing the appeal was entered on July 15th. On July 21st petitioner filed petition for reconsideration of the Order (R. 46). This petition was followed on July 23rd by motion to amend the petition (R. 51), to which was attached "Points Relied upon by Appellant" and "Findings of Fact and Conclusions of Law" to illustrate the inadequacy of the findings. This contention is set forth in Appellant's Brief (R. 20). Respondent's opposition was filed on July 26th (R. 55). Answer thereto was filed on August 1st (R. 57). Petitioner's motion for reconsideration of the Order dismissing the appeal was denied by *Per Curiam* Order entered on September 30, 1955.

3. Statement of the Facts

Petitioner employed respondent (R. 27, 28) to file suit in the United States District Court for the District of Columbia to set aside an administrative decision to remove her from Federal service. That decision (R. 34, 35) did not meet the requirements of statute and regulations. A case directly in point is *Mulligan* v. *Andrews,* 211 F. 2d 28, 30, 93 U.S. App. D.C. 375, 378 (R. 13 and 16). In filing complaint respondent withheld from evidence the decision sought to be set aside (R. 12) and substituted therefor language totally different from and not contained in the decision. Although his substituted language did not meet legal requirements he failed to challenge the inadequacy. (R. 14). His pleadings before the Courts contained contradictory statements. (R. 14, 15).

Petitioner consented to incur the expense of appeal, on the condition that he would introduce the decision in evidence and advance the appropriate contention before the appellate court. He agreed to do this. He failed to include it in Appellant's Brief and Joint Appendix. It was included in appellee's brief first filed in typewritten form, but was withdrawn by appellee upon filing printed brief. Upon petitioner's insistence, respondent obtained a printed copy of the decision, and when the Court was in session to hear the appeal he obtained permission to add it to the Joint Appendix. It is petitioner's contention that this action on his part is *prima facie* evidence of the agreement with respect thereto. However, he failed to raise any contention with respect to the decision. This is evidenced by the fact that opinion rendered by the Court (Terry v. Stevens, 203 F. 2d 219) makes no reference to the issue, as was done in the *Mulligan* case, nor does it state that the decision was admitted in evidence. It is petitioner's contention that this constituted *prima facie* evidence of his failure to carry out a specific agreement and that this failure on his part was the proximate cause of adverse decision. (R. 16).

The pertinent statute and regulation are referred to in the opinion, but are without purpose or meaning where not construed with respect to the administrative decision. Respondent's failure to bring before the Courts the decision sought to be reversed caused the Courts to render judgment on a decision which was not presented in evidence, and the legality of which was not considered by either Court. Dismissal of appeal herein constitutes sanction of this proceeding.

Immediately following adverse decision by the appellate court petitioner urged that respondent seek a new hearing. He declined to do so. She then urged that he appeal to this Court. He agreed to do so, but later retracted his promise and allowed the statute to run without action on his part.

These issues have been heard, but facts with respect thereto have not been specifically found, as is required by Federal Rules of Civil Procedure, Rule 52 (a).

In his answer to complaint herein (R. 30, paragraphs 3, 4, and 5) respondent declined to answer with respect to "proper procedure, sequence or legal effect of action taken by him on behalf of plaintiff". Since the question before the Courts was the legal effect of his handling of the case an answer by him was essential. Federal Rules of Civil Procedure, Rule 8 (d) provides:

> "Averments in a pleading to which responsive pleading is required, other than as to the amount of damages, are admitted when not denied in the responsive pleading."

Thus respondent tacitly admitted facts contrary to the purported "Findings of Fact" by the District Court.

ARGUMENT

1. DID THE COURT BELOW SANCTION DEPARTURE FROM THE ACCEPTED AND USUAL JUDICIAL PROCEEDINGS BY THE TRIAL COURT IN NOT REQUIRING THAT FINDINGS OF FACT BE MADE IN ACCORDANCE WITH FEDERAL RULES OF CIVIL PROCEDURE, RULE 52 (a)?

The only findings made by the trial court were that "The defendant was not negligent in any respect", that "The defendant performed fully and faithfully his duty and obligations to the plaintiff", and that "plaintiff suffered no damage". In memorandum opposing petitioner's motion for reconsideration of the Order dismissing the appeal (R. 55) respondent said:

> "Assuming the inadequacy of the Findings of the Court below relative to the quality of appellee's performance while acting as her attorney, it cannot be argued that the Finding of the Court below, to the effect that appellant had suffered no damage by reason of any conduct of appellee in the course of his representation of appellant, is inadequate."

It is respectfully submitted that in dismissing the appeal the court below sustained this contention, which is in conflict with authorities cited herein.

2. IN DISMISSING THE CAUSE HEREIN, WITHOUT ADEQUATE FINDINGS OF FACT, WAS THE ACTION OF THE COURT BELOW IN CONFLICT WITH DECISIONS OF THIS COURT AND WITH DECISIONS OF OTHER COURTS OF APPEAL?

(a) This Court, in *United States* v. *Causby*, 66 S. Ct. 1062, 1069, ruled:

> "But the deficiency in findings cannot be rectified by statements in the opinion. ... Findings of fact on every 'material issue' are a statutory requirement."

In the case at bar no opinion was rendered, and the facts were not found.

(b) As long ago as December 21, 1845 this Court, in *Graham* v. *Bayne*, 18 How. 60, 63, 15 L. Ed. 265, 267, ruled:

> "If a special verdict be ambiguous, or imperfect—if it find but the evidence of the facts, and not the facts

themselves, or finds but part of the facts in issue, and is silent as to others, it is a mistrial, and the court of error must order a *venire de novo*. They can render no judgment on an imperfect verdict ... The judgment of the Circuit Court is therefore reversed and a *venire de novo* is awarded."

(c) *Craig* v. *State of Missouri*, 29 U.S. 410, 426, 4 Pet. 410, 7 L. Ed. 903, 909:

"Where the office of the jury is performed by the court, the obvious substitution for an instruction to the jury in a special verdict is a statement by the court of the points in controversy on which its judgment is founded. ..."

(d) In *Smith* v. *Dental Products Co.*, C.C.A. Ill. 1948, 168 F. 2d 516, 518, reversed on June 8, 1948, the Court said:

"Under the Federal Rules of Civil Procedure, (52 (a)), 'the court shall ...'. This rule has been considered in *Mayo* v. *Lakeland Highlands Canning Co.*, 309 U.S. 310, 60 S. Ct. 517, 84 L. Ed. 774; *Bowles* v. *Russell Packing Co.*, Seventh Circuit, 140 F. 2d 354; *Bank of Madison* v. *Graber, et al.*, 158 F. 2d 137; *Dearborn National Casualty Co.* v. *Consumers Petroleum Co.*, Seventh Circuit, 164 F. 2d 332, and in various decisions in the different circuits in agreement with the announcements of the cases cited."

(e) The Conclusions of Law in the instant case consist of *one sentence*, to the effect that "the plaintiff is not entitled to recover". In *Bowman* v. *Webster*, 253 P. 2d 934, 938, 42 Wash. 2d 129, 135, the Court said:

"The Conclusions of Law consist of *one sentence* (emphasis supplied) to the effect that respondents are entitled to judgment. ... The result is that appellants have been deprived of an opportunity to challenge findings of fact, and any consideration by us of the legal questions involves speculation as to just what legal theory the court pursued. ... When presented with such a situation in the past, we have fol-

lowed one of three courses. The most extreme remedy we have invoked has been to reverse and remand for a new trial. *Kennedy* v. *Derickson*, 5 Wash. 289, 31 P. 766; *Jones* v. *Bard*, 40 Wash. 2d 877, 246 P. 2d 831. The most lenient remedy utilized, where one finding of fact was incomplete, has been to remand (without reversal) giving the parties an opportunity to file additional arguments after the necessary finding has been supplied. *Michaelson* v. *Hopkins*, 37 Wash. 2d 453, 244 P. 2d 350."

The *Kennedy* case cited is directly in point with the instant case with respect to

"The Findings of Fact and Conclusions of Law made by the judge at chambers were immediately followed by entry of judgment."

Petitioner received unsigned copy of the purported "Findings of Fact and Conclusions of Law" on the same date that the judgment was entered.

(f) In *Hicks* v. *Barnes*, 241 P. 2d 648, 650, 109 C.A. 2d 859, 862, the Court said:

"Where an action is tried before the court without a jury, findings are required upon all material issues presented by the pleadings and the evidence, and if the court rendered judgment without making such findings judgment must be reversed."

(g) In *Kweskin* v. *Finkelstein*, U. S. Court of Appeals, Seventh Circuit, 223 F. 2d 677, 678, reversed on June 23, 1955, the Court said:

"The finding that plaintiff failed to prove the allegations of the complaint is not a finding of fact but is a conclusion of law. ... Without adequate findings we are left in the dark. Certainly we are unable to say that the judgment of the trial court was correct."

3. DID THE COURT BELOW DEPART FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS IN RENDERING JUDGMENT IN CONFLICT WITH ITS OWN DECISIONS IN OTHER CASES ON THE SAME MATTERS, AND IN SUBSTITUTING THE RECOMMENDATION OF AN AMICUS CURIAE FOR FINDINGS OF FACT BY THE TRIAL COURT?

(1) Conflicting Decisions of the Court Below

(a) In *Rainey* v. *Rainey*, 76 U.S. App. D.C. 341, 342, 131 F. 2d 349, 350, reversed and remanded on November 2, 1942, the Court said:

> "No findings were filed by the judge; no brief was filed in this court on behalf of appellee; and the record was so inadequate as to make impossible the determination of several points urged by appellant.

In the case at bar no findings were filed by the judge; no brief was filed on behalf of appellee; and the record was inadequate.

(b) In *Fogle, et al.* v. *General Credit, Inc.*, 71 App. D.C. 338, 110 F. 2d 128, reversed and remanded on January 29, 1940, the Court quoted verbatim the findings of the trial court, and said:

> "There is nothing in the record indicating what the admitted evidence was or what the court found as admitted facts. If the foregoing recital was intended to be a finding of facts, it was but partial. Numerous other items of fact were in issue under the pleadings. ... In the absence of evidence upon which the case was decided and of findings of fact, the case is not in a condition to be reviewed."

(c) In *National Savings & Trust Co.* v. *Shutack*, 139 F. 2d 371, 78 U.S. App. D.C. 232, reversed and remanded on December 6, 1943, the Court said:

> "The court denied the petition without making any finding to support its action or assigning any reason for so doing. ... This is a case which illustrates the importance of the rule which requires the court to find the facts specially. ..."

(d) Also see *Associates Discount Corporation* v. *Crow*, 1940, 71 App. D.C. 336, 110 F. 2d 126, and *Boss* v. *Hardee*, 68 App. D.C. 75, 93 F. 2d 234, 236, citing three decisions of this Court.

(e) Also see *Keneipp, et al.* v. *United States* and *Cornwell* v. *United States*, (pp. 14, 15 *infra*).

(2) Report of Amicus Curiae

Since the court below assigned no reason for dismissing the appeal it is necessary to resort to the report of *amicus curiae* (R. 43), and to assume that the reasons were (a) lack of merit, and (b) failure to file complete transcript of testimony.

(a) Dismissal for Lack of Merit.

Mr. Campbell had before him petitioner's brief setting forth the issues in the case, and respondent's motion to affirm and dismiss, in which he stated that those issues had been "fully scrutinized below" (R. 37). In the light of authorities cited herein, and others too numerous to cite, Mr. Campbell undoubtedly was aware that the trial court had failed to comply with statute and law with respect to findings of facts. He naively referred to the "Findings of Fact" (R. 41) and "assumed that there was evidence to support the findings". (R. 43).

The findings indicate that defendant assumed the burden of proof, but they were not substantiated by evidence. In *Interstate Commerce Commissioner* v. *L. & N. R. Co.*, 57 L. Ed. 431, 33 S. Ct. 185, 227 U.S. 88, 93, this Court ruled:

> "A finding without evidence is arbitrary and baseless."

Moreover, had there been evidence to support these "findings", as Mr. Campbell assumed, it is reasonable to believe that respondent would have been willing to cooperate in filing a joint appendix. (P. 13 *infra*).

Mr. Campbell's report quotes from a memorandum written by petitioner within an hour after the case in question was heard by the appellate court, and at a time when she believed that respondent had complied with his specific agreement to rectify his negligence in the trial court, by introducing evidence *de novo*. Mr. Campbell attached great weight to this memorandum, which he referred to as "Defendant's Exhibit 4". (R. 42). In *Goldblatt* v. *Ferrigno*, 138 Conn. 39, 82 A. 2d 152, 154, the Court said:

> "If the court intends to find a specific fact contained in an exhibit it should include it among the facts found, or by reference to the exhibit state that the facts recited therein are found."

It is respectfully submitted that Mr. Campbell exceeded his authority in reading into the trial court's purported "Findings of Fact" a fact which was not found there.

The issue before the Court in this regard was respondent's *failure to act* and the *legal effect thereof*. This issue was clearly presented before the trial court, supported by citation of *Mulligan* v. *Andrews*, 211 F. 2d 28, 30, 93 U.S. App. D.C. 375, the pertinent portions of which were read into the record.

(b) Dismissal for Failure to File Complete Transcript of Testimony

Mr. Campbell gave as his reason for assuming that "there was evidence to support the findings" the fact that ". . . appellant failed to bring to this court the transcript of testimony showing the evidence upon which the District Court based its findings of fact". (R. 43) In *McGowan* v. *Elroy*, 28 App. D.C. 84, 85 the Court said:

> "The object of the motion in this case is to compel the bringing up and adding to the record the evidence taken in the court below. As the cause must be tried upon the pleadings and decree and not upon that evi-

> dence, the record here ought not to be encumbered with it. The motion is *denied, with costs.*"

It is petitioner's contention that since there were no "facts" to be supported, no useful purpose would have been served by encumbering the record with a "transcript of testimony". This contention was presented to the Court, (R. 47).

The instruction of the appellate court is:

> "Therefore, counsel in this case should get together and arrange to have either (1) a joint appendix printed, or (2) to have the matter both sides need printed as an appendix to appellant's brief."

Petitioner made every effort to comply with this instruction, but met with no cooperation. On May 11th she suggested that the parties stipulate the facts as provided in Federal Rules of Civil Procedure, Rule 76. This is referred to in excerpt from letter dated May 16, 1955 (R. 57), in which petitioner renewed her offer to procure the complete transcript. In a conference on May 17th the parties were unable to agree on facts to be stipulated for a joint appendix. On May 19th respondent served copy of motion to affirm and dismiss, accompanied by a letter (R. 58) agreeing to cooperate with respect to a joint appendix should the motion be denied.

Petitioner had only one conference with Mr. Campbell. No one else was present. She offered to procure for him a complete transcript of the proceedings in the trial court. He evinced no interest in seeing it. She has no information as to what conferences he had with respondent, or as to what respondent's "best recollection of the evidence" was (R. 42). It is respectfully submitted that for Mr. Campbell to use the "best recollection" of either party as a basis for recommending dismissal of the appeal is a departure from "the accepted and usual course of judicial proceedings". This is particularly true where Mr. Camp-

bell was fully aware that the parties were unable to stipulate the facts.

The combined efforts of respondent and *amicus curiae* to have the appeal dismissed produced only two supporting authorities—(a) *Cornwell* v. *United States,* 79 U.S. App. D.C. 398, 146 F. 2d 661, and (b) *Keneipp, et al.* v. *United States,* 92 U.S. App. D.C. 187, 203, F. 2d 397.

(a) The *Cornwell* case, cited by respondent (R. 39), was heard on motion to affirm and dismiss. The decision sets forth that the suit was begun in June, 1936 and was tried to a jury in June 1938. On Appeal, February, 1941, it was reversed (*Cornwell* v. *Cornwell and United States,* 73 App. D.C. 233, 118 F. 2d 396). After thirteen postponements the case was again tried to a jury on October 12, 1943. In opinion dismissing the appeal on December 11, 1944, the Court said:

> "Notice of appeal was filed October 29th following and on December 13th the record, contrary to our rules, not having been filed, appellee docketed the appeal on a short record and moved to dismiss for failure to file the record within the time permitted under the rules. *We denied this motion* (emphasis supplied), and allowed appellant until April 1st, at which time the entire record was transmitted to this court without expense to appellant, on the order of the District Judge. Thereafter we extended the time to file appellant's brief to July 15th. No brief has yet been filed. ..."

The *Cornwell* case contains nothing to support motion to dismiss appeal herein. Indeed, it supports instead petitioner's pleading for reversal and remand. It presents a sharp contrast to the summary manner in which appeal herein has been dealt with.

(b) In citing the *Keneipp* case (R. 43) Mr. Campbell made no reference to the fact that on first appeal (87 U.S. App. D.C. 242, 247, 184 F. 2d 263, 268) the Court encountered an insufficient finding, and on July 24, 1950, reversed

and remanded the case with instructions for a more complete finding. The pertinent aspects of the *Cornwell* and *Keneipp* cases were brought to the attention of the court below in motion filed by petitioner. (R. 47, 48).

CONCLUSION

For the reasons set forth herein petitioner prays that writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

MAY TERRY, *Pro Se*